Supreme Court, U.S.
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No. 98-102

In The

Supreme Court of the United States

October Term, 1997

PETE LIEN & SONS, INC., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL, AND JIM DISNEY, in their Capacity as Members of the Board of County Commissioners of Larimer County, Colorado,

Respondents,

v.

THE SANDY FLATS DEFENSE COALITION, A Colorado Nonprofit Corporation,

Intervenor.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. BOARD AND INTERVENORS INCORRECTLY CONCLUDE THAT DENIAL OF USE ON REVIEW BY BOARD WAS NOT A CATEGORICAL TAKING OF ALL INTEREST IN THE LEASE OF A SEVERED MINERAL ESTATE

Board and Intervenor both argue in opposition to Lien's Petition that Board's denial of Lien's application for special review to mine was not a categorical taking. (See generally Bd. Opp. Cert. 5-10, Intervenor Opp. Cert. 3-10). In making this argument, both Board and Intervenor rely upon assumed facts which are not in the record.

For example, Board first argues that Lien's property interest comprises only one mineral in the mineral estate and that " . . . other minerals and hydrocarbons are unaffected by the county action under review".[1] (Bd. Opp. Cert. 5, 6). Likewise, Intervenor makes a similar argument by suggesting that depriving Lien of the right to mine sand is a denial of only one stick in the bundle of rights. (Intervenor Opp. Cert. 4-6). To advance these arguments, both Board and Intervenor assume facts which are not in the record. There are no facts in the record that other minerals or hydrocarbons are found on the land subject to the mineral lease. Indeed, the record

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[1] Board suggests that Lien inaccurately described its property interest as a severed mineral estate. (Board Opp. Cert. 5). However, Board does not offer any legal authority in support of this claim nor does Board suggest what the property interest is.

clearly establishes that the only commercially recoverable mineral on the property is the sand leased by Lien.

Based upon this record, Board moved for summary judgment. Lien opposed Board's motion for summary judgment, arguing that takings litigation involve factual issues that normally cannot be resolved except on a complete record or trial. *Yuba Goldfield, Inc. v. United States*, 723 F.2d 884, 887, 891 (Fed. Cir. 1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 295 (1981). Despite the objections, Board's motion for summary judgment was granted by the District Court and that decision was affirmed by the Colorado Court of Appeals. Thus, the attempt by Board and Intervenor to now rely upon facts which are not in evidence to support their argument that Board's denial was not a categorical taking is inappropriate. *Jafay v. Board of County Commissioners*, 848 P.2d 892 (Colo. 1993). If material facts are in dispute then summary judgment should not have been granted. *Id.*

In its opposition, Board argues for the first time that Board's denial of Lien's application was not a categorical taking because Lien's application covered only a portion of the land subject to the lease. (Bd. Opp. Cert. 6). Board assumes that other portions of the property subject to the lease include commercially recoverable sand. Here again, Board's argument is predicated upon assumed facts which are not a part of the record. There is absolutely no basis in the record for concluding that Lien has property rights which were not rendered worthless by Board's denial of Lien's application.

Board and Intervenor continue their argument that Board's denial was not categorical because Lien retained sticks in the bundle of rights. (Bd. Opp. Cert. 9). Presumably the sticks still remaining in Lien's bundle of rights are other minerals and hydrocarbons. But, as already indicated, the record does not support this argument. It is pure speculation at this time to assume that other minerals are located on the property.[2]

Perhaps the most incredible argument made by Board and Intervenor is their argument that the surface estate, which is **not** owned by Lien or Rock Springs Royalty Company, should be included with the subsurface mineral estate (Bd. Opp. Cert. 9). Both the surface estate and subsurface estate should form the denominator, according to Board and Intervenor. They argue that because Board's action does not affect the surface owner's use of the surface of the property the denial cannot be considered to be a categorical denial. (Bd. Opp. Cert. 9, Intervenor Opp. Cert. 6). Their argument ignores both the fact that the surface is owned by a third party who was not involved in this action and the numerous authorities cited by Lien in its Petition which conclusively establish that a severed mineral estate is a

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[2] Board also implies that Lien waived its Fifth Amendment right to just compensation. Board bases this suggestion upon one unsworn comment by Lien at the hearing before Board that Lien would be willing to consider terminating mining at a different quarry (Weaver Quarry) provided Board granted use on review in this case. (Bd. Opp. Cert. 6). However, Board fails to cite any legal authority that Lien's willingness to consider this would constitute a legal waiver of a constitutional right.

separate property interest which is entitled to constitutional protection. (Lien, Petition 12-13).

Neither Board nor Intervenor offer any legal authority in support of this argument nor does Lien believe any authority exists. On the other hand, Lien has cited numerous authorities which establish that regardless of whether or not a property owner owns both the surface and subsurface estates, denial of mining is a taking. For example, in the context of mineral leases, the Federal Circuit in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 592 (1991) did not accept the government's argument that denial by the United States of a license to mine coal would not constitute a taking because the coal owner could farm the surface estate. In other words, the coal owner retained sticks in the bundle of rights, i.e., the surface estate.

Finally, Board and Intervenor rely upon *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) to support their proposition that Board's denial was not a categorical taking. (Bd. Opp. Cert. 7-9; Intervenor Opp. Cert. 8-10). Both cases have no applicability. *Keystone* does not apply because it is not a categorical taking case. *Penn Central* does not apply because, in addition to not being a categorical taking, it involved but one owner of the entire property interest. Compare the *Penn Central* single ownership with this case in which severance of the surface from the subsurface estates occurred early in the century. The severance did not occur contemporaneously with the lease of the subsurface mineral estate to Lien and cannot by any stretch of the imagination be viewed as an attempt to bootstrap into the

Lucas analysis. (Amicus Curiae Brief of Union Pacific, Colo. Ct. of App., p. 1).

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR THIS COURT TO ESTABLISH THAT A PARTY'S KNOWLEDGE OF AN EXISTING REGULATORY SCHEME DOES NOT CREATE AN EXCEPTION TO THE RULE THAT A CATEGORICAL TAKING REQUIRES JUST COMPENSATION

Board and Intervenor both argue that Board's denial was not a categorical denial of all use and, thus, the appropriate standard in this case is the ad hoc factual inquiry approach this Court set forth in *Penn Central*, rather than the analysis this Court set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Essentially, both Board and Intervenor iterate the mistake made by the Colorado Court of Appeals when it failed to even address the categorical nature of the use deprivation.

For example, neither the Colorado District Court nor the Colorado Court of Appeals ever addressed, and they certainly did not decide that the denial by Board was not a categorical taking. Instead, the Colorado courts deliberately ignored the issue, choosing instead to focus on the fact that at the time Lien acquired its interest in the lease it was aware of the existing regulatory scheme. In reliance on this, the Colorado courts applied the *Penn Central* analysis and held that Lien's investment-backed expectation was unreasonable. Appendix A, App. 9, 10. The Colorado courts refused to recognize that Lien's knowledge of an existing regulatory scheme does **not** create an exception to the rule that a categorical taking requires just compensation.

This Court stated in *Nollan* that the timing of property acquisition vis-à-vis governmental regulatory authority is not determinative of the right to just compensation. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n. 2. Several states including Florida, Massachusetts, New Jersey and Michigan and the Federal Court of Appeals have all followed the *Nollan* language and reject the notice of regulatory authority argument as an exception to the requirement that just compensation be paid in a categorical taking case.[3] Moreover, despite this Court's *Nollan* language, the Colorado courts in this case chose to ignore the clear import of the language. Other courts have chosen to do the same.

The disregard the Colorado courts have for the *Lucas* analysis in categorical takings is and will be shared by other courts, especially when they recognize their decisions will not be overturned. On the other hand, the Federal Court of Appeals and the courts of several other states have rejected the Colorado approach, choosing to follow this Court's lead in *Lucas*.[4] Therefore, rather than

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[3] Lien, Petition pp. 17-24.

[4] *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Vatalaro v. Department of Environmental Regulations*, 601 S.2d 1123, *review denied*, 613 S.2d 3 (Fla. 1992); *Lopes v. City of Peabody*, 32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992), *review denied*, 413 Mass. 1105, 600 N.E.2d 171 (1992), *cert. granted* and *judgment vacated*, 113 S.Ct. 1574 (1993), *on remand*, 417 Mass. 299, 303, 629 N.E.2d 1312, 1314-15 (1994); *Moroney v. Mayor and Council*, 633 A.2d 1045 (N.J. Super A.D. 1993); *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996).

the uniformity this Court adopted in *Lucas*, regulatory takings will regress to the point of " . . . eschew(ing) any 'set formula' for determining how far is too far, preferring to 'engag(e) in . . . essentially ad hoc factual inquiries' " *Lucas*, 505 U.S. 1003 at 1015.

Therefore, this case is an appropriate vehicle for this Court to confirm that it meant what it said in *Nollan*, i.e., that timing of property acquisition vis-à-vis knowledge of a regulatory scheme is not the determinative issue in deciding just compensation. Lien respectfully suggests this Court must confirm that the *Nollan* language applies in a categorical taking case. Without such declaration from this Court, the Fifth Amendment right to just compensation will depend entirely upon where (in which state) the property is located rather than the analysis this Court set forth in *Lucas*.

Furthermore, this case is not burdened with corollary issues. For example, the property interest here is clearly only a severed mineral estate which was severed early in the century. No use remains for the severed mineral interest. Under Colorado law, mining cannot prospectively be declared a nuisance.[5] *Green v. Castle Concrete Co.*,

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[5] Because there can be no prospective determination that Lien's proposed use (i.e., mining) would create a nuisance, Board cannot assert the second prong of *Lucas* as a defense. *Green*, 509 P.2d at 588. This did not stop Board and Intervenor in making the argument nor did it stop the Colorado courts in concluding as much when, for example, the Court of Appeals concluded that " . . . the proposed use to be inappropriate at that particular site." Appendix A, App. 10, 11. This conclusion by the Court of Appeals was based upon unsworn anecdotal speculation testimony that Lien's proposed use might in the

509 P.2d 588 (Colo. 1973). Thus, this case can set the stage for this Court to reject an expansion of the narrowly tailored *Lucas* exception to the requirement of just compensation in categorical takings cases.

This Court can and should clearly hold that a party's knowledge of an existing regulatory scheme is not a defense from the requirement that just compensation be paid in a total takings case. Without a clear pronouncement by this Court, the guarantee of just compensation will continue to be unequally applied by the courts in the various states.

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future constitute a nuisance. This finding by the Court of Appeals that Lien's proposed mining would constitute a nuisance precluded Lien from its right to defend itself in a court of law against a claim that its mine constituted a nuisance. Thus, the very essence of the *Lucas* holding has been emasculated by the Colorado courts because Lien gets neither just compensation nor the right to defend itself.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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